

**PUBLIC TRUST**

**SUBMISSION TO**

**MINISTRY OF ECONOMIC DEVELOPMENT**

**ON THE**

**EXPOSURE DRAFT OF THE FINANCIAL MARKET'S  
CONDUCT BILL**

**6 SEPTEMBER 2011**

## **Introduction**

This submission is from Public Trust. Public Trust is a Crown entity established under the Public Trust Act 2001. Public Trust is New Zealand's largest and oldest trustee organisation, set up in 1873 with a unique mandate to protect the future of New Zealanders. Public Trust offers independent, professional trustee services and related financial services to New Zealanders at different stages of their lives, and assists with carrying out their wishes after they have died. In these capacities, Public Trust works with a range of charitable trusts, term estates and other customers, managing their funds and helping to improve their lives in many different ways. Public Trust also acts as an independent trustee for a number of other investment schemes, protecting the interests of investors.

Public Trust offers a wide range of products and services. Under its Corporate Trustee Services umbrella Public Trust has approximately \$28 billion under supervision. All of the services provided by Public Trust are tailored to meet the requirements of three key market segments - Personal, Business and Corporate.

Public Trust's primary purpose is to help all New Zealanders grow and protect the important things in their lives. Public Trust's vision is to be a leader in the trustee services market.

Public Trust appreciates this opportunity to comment on the exposure draft of the Financial Markets Conduct Bill ("the Bill").

## **Public Trust's General Comment**

Public Trust generally supports the substantial revision and update of New Zealand's securities laws and regulatory regime. The tight timeframe to submit on the Bill has been challenging, and on this basis we would welcome the opportunity for further discussion with officials in respect of our submissions regarding:

- offers by the Crown etc (Schedule 1, Part 1, clause 19(a));
- exclusions from governance or supervision requirements for debt securities (Schedule 1, Part 3); and
- amendments to the Public Trust Act 2001 (clause 570) and Public Trust Regulations 2002.

We are also happy to discuss any of our other submissions and comments in further detail. Please contact:

Mike Birchler  
Senior Corporate Solicitor  
Public Trust

DDI: 04 894 9727  
Email: [mike.birchler@publictrust.co.nz](mailto:mike.birchler@publictrust.co.nz)

We strongly suggest that consultation on the various regulations and other frameworks and methodologies to be prescribed by the Financial Markets Authority ("FMA")

commences at an early stage to allow for well considered input. Further to this, we recommend that regulations are issued at such a time as will allow issuers plenty of time to implement them.

### Public Trust's Submission

Public Trust generally supports the submissions of the Trustee Corporations Association of New Zealand Inc ("TCA") and the Investment Savings and Insurance Association of NZ Inc ("ISI") in relation to the Bill. Public Trust makes this individual submission to outline technical aspects unique to Public Trust and to further emphasise key provisions of the Bill which we consider to require further attention.

Clause Number	Clause heading	Submission
<b>Part 1</b>	<b>Preliminary provisions</b>	
Clause 10(2)(c)(i)	Definitions of issued and issuer	Managed investment schemes should be included as prescribed schemes because investors have the ability to set up direct debits for regular contributions to these schemes and it would be inefficient if those circumstances gave rise to the issue of a financial product.
Clause 10(2)(c)(iii)	Definitions of issued and issuer	On-call accounts and term deposits should be included as "prescribed deposit products" given the nature of those financial products. It would be inefficient if every deposit into an on-call account or roll over of a term deposit gave rise to the issue of a financial product.
<b>Part 2</b>	<b>Misleading or deceptive conduct or false or misleading representations</b>	
<b>Part 3 and schedules 1 and 2</b>	<b>Disclosure offers of financial products</b>	
Clause 35(a)	Certain situations in which section 34 does not need to be complied with	Public Trust submits that a new PDS should not have to be received by an investor if the new information it contains is not materially adverse to an investor.
Clause 40	Meaning of material information	Public Trust prefers Option B as issuers are more familiar with the concepts outlined in Option B as opposed to the concept of demand.
Schedule 1, Part 1, clause 19(1)(a)	Offers by the Crown, local authorities, etc	Public Trust offers debt securities (on-call and term deposits). Those deposits are held in Public Trust's Common Fund. Funds held in the Common Fund are guaranteed by the Crown.  Under the Securities Act 1978, Public Trust (in relation to money held in its Common Fund) and the Maori Trustee

Clause Number	Clause heading	Submission
		<p>are included in the definition of ‘Crown’ (via the inclusion of ‘government departments’ in that definition) and as a result are exempt from certain provisions of that Act (e.g. the requirement to have a trustee and registered prospectus (see s 5(3) Securities Act 1978)).</p> <p>While section 5(3) of the Securities Act 1978 has been replicated in clause 19 of Schedule 1 of the Bill (with the addition of local authorities) the definition of ‘Crown’ appears to have been overlooked. We assume this definition of ‘Crown’ will be carried over into the Financial Markets Conduct Act (“FMCA”).</p>
Schedule 1, Part 3	Exclusions from governance or supervision requirements for debt securities	<p>Public Trust prefers the alternative approach outlined in paragraph 132 of the MED Explanatory Material accompanying the exposure draft. The reasons for this are as follows:</p> <ul style="list-style-type: none"> <li>• We consider there is greater benefit to customers in having disclosure rather than a governance regime because the entities that would be exempted under such an approach are subject to other prudential supervisory requirements (banks and Public Trust as a Non Bank Deposit Taker (“NBDT”). Public Trust is also subject to effective governance and monitoring by virtue of the Public Trust Act 2001, being a Crown entity under the Crown Entities Act 2004, and duties imposed on trustees under the Trustee Act 1956.</li> <li>• In Public Trust’s case, the deposits in question are guaranteed by the Crown. Debt securities offered by Public Trust are held in its Common Fund. Section 52 of the Public Trust Act provides that if the Common Fund is insufficient to meet the lawful claims on it, the Minister of Finance must pay out of the Crown account such amounts as may be necessary to meet the insufficiency. A guarantee of interest in the Common Fund is provided under section 65ZD of the Public Finance Act 1989. This is commonly referred to as the “Crown Guarantee”. The level of support provided by the Crown is further recognised in section 42 of the Public Trust Act which provides that if Public Trust’s funds are insufficient to meet any of its liabilities and commitments the Minister of Finance may, without any further appropriation than that section, advance out of the Crown Account such sums as are necessary to meet them. That estate monies should be afforded a Crown Guarantee is a longstanding and key component of the service proposition</li> </ul>

Clause Number	Clause heading	Submission
		<p>Public Trust offers New Zealanders.</p> <ul style="list-style-type: none"> <li>• The Crown Guarantee, the legislative framework within which Public Trust operates and its governance ensures depositors are protected as intended by the FMCA. These factors, and coupled with the provision of disclosure under the FMCA will ensure that the objectives of the FMCA are met without requiring any additional governance.</li> <li>• Having a more standardised approach in terms of extending the PDS disclosure requirements to more debt security products and those products being exempt from the governance regime, would be the best way to achieve the purposes of the FMCA given that many debt issuers, including Public Trust are already subject to extensive governance.</li> </ul>
<b>Part 4 and schedule 3</b>	<b>Governance of financial products</b>	
Clause 101(3)(b)	Duty of issuer to provide requested information and reports to supervisor	<p>While it is appropriate that some (in particular periodic) reports be signed by 2 directors on behalf of the board of an issuer, we wonder whether it is appropriate that this be required in respect of all reports and information requested by a supervisor.</p> <p>In practice it will take time for a board to approve an ad-hoc report and delegate execution of it to 2 directors.</p> <p>We suggest that a supervisor have a discretion as to whether it requires a report/any information to be signed by 2 directors on behalf of the board of an issuer.</p>
Clause 113 (1) (c) + 113 (2)	Additional registration requirements for Superannuation Schemes	<p>The proposed restriction of Superannuation Scheme new members normally to NZ permanent residents only, effectively prohibits the offer of Qualifying Registered Overseas Pension Schemes (QROPS) by NZ managers. This prohibition appears contrary to the Government's stated intention to develop NZ as a centre of financial services.</p> <p>NZ currently offers approved QROPS which is an accepted entity globally for expatriates to transfer pension schemes and invest into. The change promoted here appears to close down a reasonable business and growth opportunity for NZ. No doubt the robustness of the QROPS regime in NZ, could be enhanced with the appointment of NZ licensed independent corporate trustees.</p>
Clause 128(1)(b)(ii)	Functions of supervisor	The obligation to supervise the financial position of the manager (as opposed to the Scheme) is not necessary. The

Clause Number	Clause heading	Submission
		FMA will be performing this function as the manager will be required to be licensed. Presumably in order for the manager to remain licensed it will have to meet financial criteria.
Clause 136	Custodian holds scheme property on trust	<p>It is not clear how this section is intended to work in practice. It needs to be clear that the requirements of the section will be satisfied if the custodian keeps proper records (ie, separate internal accounts for each client) of the assets that it holds.</p> <p>There should also be clarity that this clause does not mean that a custodian cannot omnibus assets it holds for various clients.</p>
Clause 143(1)	Changes to statement of investment policy and objectives	This requires only <u>consultation</u> with the supervisor, it should be with the consent of the supervisor.
Clause 145(3)	Action that must be taken on limit breaks	The obligation to report should be consistent with the reporting obligations in clause 146(3).
Clause 170(2)	Cancellation of registration	This clause should also extend to the supervisor, ie. the manager should notify the scheme participants <u>and</u> the supervisor.
Clause 173(2)	Duty of investment manager, administration manager and custodian to report serious problems	This seems to be a sizable extension to the obligations of the custodian. While the reporting requirement is appropriate for the investment manager and administration manager (as delegates of the fund manager), the kinds of monitoring obligations implied by this clause are not appropriate for an independent custodian. The custodian's duties are typically limited to holding assets and executing trades on instruction. It will not therefore, in the ordinary course of its functions, have the necessary information. It is also generally the supervisor's responsibility to delegate the custody function, so an independent custodian is unlikely to have the requisite information about the issuer. On this basis, a custodian should only be required to report breaches as soon as practicable after they become aware of the breach.
Clauses 177 and 178	Duty of supervisors to report...	These clauses appear to deal with the reporting obligations currently contained in the Corporations (Investigation and Management) Act (CIMA). However, there does not appear to be any amendment to the CIMA to remove the reporting obligations from that Act.
<b>Part 5</b>	<b>Dealing in financial products on markets</b>	

Clause Number	Clause heading	Submission
<b>Part 6</b>	<b>Licensing and other regulation of market services</b>	
	Licensing and other regulation of market services	Public Trust submits that the licensing regime should extend to the licensing of custodians, and in this regard, supports the TCA submission on the Bill in this respect.
<b>Part 7</b>	<b>Enforcement and liability</b>	
<b>Part 8</b>	<b>Regulations and exemptions</b>	
<b>Part 9</b>	<b>Miscellaneous provisions</b>	
Clause 554	Amendments to Financial Advisers Act 2008	Public Trust submits that the regulation of Discretionary Investment Management Service (“DIMS”) providers be provided for under one piece of legislation, given the potential for overlap if the current proposals were to proceed. On this basis, the provisions relating to DIMS in the Bill should be removed and there should be further consultation regarding any reform in relation to DIMS.
Clause 570	Amendments to Trustee Companies Act 1967 and Public Trust Act 2001	<p>We note that this clause has been included as a note and has not been drafted as yet.</p> <p>It is not clear how the transitional provisions in sections 572 – 578 apply to existing external Group Investment funds (“GIF’s”).</p> <p>Public Trust agrees with the submissions of the TCA regarding clause 570 of the Bill, and makes the further submission below.</p> <p><b><i>Ability to offer GIF’s as a regulated offer</i></b>  We submit that external GIF’s established under the Public Trust Act 2001 should be able to be offered as a regulated offer. Public Trust currently offers 16 external GIF’s to its customers (being members of the public as defined in the Securities Act 1978) as participatory securities and complies with the Securities Act 1978 as it is applicable to offers of participatory securities. Accordingly, those funds have a statutory supervisor, trust deed, investment statement and prospectus. On this basis, there is no perceivable benefit which Public Trust gains over other issuers by being able to offer external GIF’s to members of the public.</p> <p>In this regard, Public Trust submits that external GIF’s should be able to be offered under the FMCA as a regulated offer of Managed Investment Products provided the external GIF’s comply with all relevant provisions of the FMCA. On this basis, the definition of Managed</p>

Clause Number	Clause heading	Submission
		<p>Investment Scheme in section 9 should have a clause inserted which includes external GIFS established under the Public Trust Act 2001 in the definition of managed investment schemes so that Public Trust can offer them as a regulated offer.</p> <p>It is noted that Public Trust also has a number of internal GIFs that are not offered to the public and do not fall under the Securities Act 1978 which it uses for investments for the publicly offered GIFs, estates, accident trusts and certain charitable trusts.</p> <p><b><i>If GIFs cannot be offered as a regulated offer</i></b>  If Public Trust is unable to offer external GIF's as a regulated offer under the FMCA, then there must be provision in the FMCA for a conversion mechanism to allow the external GIFs that are currently offered to the public under the Securities Act 1978 to be transitioned to regulated offers under the FMCA. A clause should be inserted into the FMCA which states that a managed investment scheme includes an external GIF established under the Public Trust Act 2001 before the commencement of the FMCA.</p> <p>The Public Trust Act currently, in terms of establishing managed funds, expressly gives Public Trust the power to establish GIFs. To remove any doubt that they can be offered, there should, therefore, be provisions inserted into the Public Trust Act that empower Public Trust to make a regulated offer under the FMCA. Public Trust sees it as imperative to its business that under the new regime it has at least the same ability to invest its customer's money it has now.</p> <p>Public Trust notes the proposed wording is to restrict the use of GIFs to "the internal management of estates and assets in the trustee company's or Public Trust's possession in the ordinary course of its business as a trustee". If it is determined to restrict Public Trust's use of GIFs in the manner suggested in the notes at clause 570, then Public Trust submits that the definition of 'ordinary course of its business as a trustee' will need to be amended so that it is consistent with the definition of 'estate' and the functions of Public Trust in the Public Trust Act 2001 ("the PT Act"). On this basis, Public Trust submits that the restriction should read, "ordinary course of its business".</p> <p><b><i>Public Trust Regulations 2002</i></b>  Public Trust further submits that the Public Trust Regulations 2002 will need to be amended as a result of the</p>

Clause Number	Clause heading	Submission
		enactment of the FMCA to ensure consistency in required disclosures under both the FMCA and the Regulations.
Clause 578	All offers and allotments under old law must cease within two years of commencement	This clause only refers to “offer” or “allotment”. What happens if neither occurs (because the existing offer was a close-ended offer that closed before the FMC Bill came into force)? Does the 2 year time limit apply in those cases or can an existing offer continue under the old regime? We would submit that a dual supervisory regime is unnecessary and overly cumbersome for a supervisor.
Subpart 10	Transitional provisions	Along with the TCA and the ISI, we strongly support a transitional period of a minimum of 24 months.



**Ann Brennan**  
**General Counsel**  
**Public Trust**  
**6 September 2011**